Supreme Court, U.S.
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No. 97-1649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Stephen A. Arneson,

Petitioner,

v.

Kenneth S. Apfel,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

Only two arguments made in the Brief in Opposition merit substantial attention. First, the Eighth Circuit's decision conflicts with *Brown v. Secretary of the Army* (918 F.2d 214 (CADC), *cert. denied*, 502 U.S. 810 (1991)) and its progeny, and that conflict can only be resolved by this Court. Second, this case involves the proper construction of the *Back Pay Act*, not Title VII or the Civil Rights Act of 1991 ("CRA"). Because the Back Pay Act applies to all manner of cases, including cases under the Age Discrimination in Employment Act, the question presented has substantial continuing significance. The Petition for Certiorari therefore should be granted.

THE CIRCUITS ARE DIVIDED OVER WHETHER THE BACK PAY ACT AUTHORIZES INTEREST UNDER THE ANTI-DISCRIMINATION STATUTES

1. The circuits are divided over whether the Back Pay Act authorizes the award of interest to prevailing plaintiffs under the anti-discrimination statutes. Then-Judge Ginsburg's opinion for the D.C. Circuit in *Brown v. Secretary of the Army* held that interest is available when the terms of the Back Pay Act are satisfied. The Fourth and Tenth Circuits subsequently agreed in cases brought under the ADEA and Title VII (*Edwards v. Lujan*, 40 F.3d 1152 (CA10 1994), *cert. denied*, 516 U.S. 963 (1995); *Wolff v. Bowles*, 57 F.3d 407 (CA4 1995)), as have seven different district courts (*see* Pet. 18). The Eighth Circuit, by contrast, ruled in this case that interest is not available because it found "the reasoning in those cases inconsistent with sovereign immunity and the no-interest rule." Pet. App. at 54a-56a.[1]

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[1] Respondent contends that Petitioner sought interest, but not back pay, under the Back Pay Act. BIO 9. Whatever its merits, Respondent correctly does not argue that its assertion makes this case an inappropriate vehicle to resolve the question presented. The plaintiffs in *Brown*, *Edwards*, and *Wolff* similarly sought back pay under Title VII and the ADEA rather than the Back Pay Act.

2. Both the D.C. Circuit and D.C. District Court repeatedly have deemed *Brown*'s conclusion that interest is available when the terms of the Back Pay Act are satisfied to be binding precedent, not "dictum" as Respondent erroneously asserts. In *Brown* itself, "[t]he government principally argue[d]" (918 F.2d at 216) that the Back Pay Act's interest provision does not apply to back pay awards under the anti-discrimination statutes, and the court rejected that argument only after extensive analysis (*id.* at 216-18) as the government explained in the Brief in Opposition in *Brown* itself:

> At the outset, the court *rejected* the government's contention that the Back Pay Act may not be employed in Title VII actions to supplement the relief authorized by Title VII itself. The court *ruled* that the two statutes "are most sensibly read as complementary" and that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards."

BIO, *Brown v. Stone*, No. 90-1733, at 3 (emphasis added).

Moreover, Respondent does not dispute that "[t]he government's subsequent effort to persuade the D.C. Circuit to abandon the holding of *Brown* was rebuffed." Pet. 17. In *Lee v. Baker*, the D.C. Circuit granted the plaintiff's motion for summary affirmance of the district court's decision awarding interest (741 F. Supp. 990 (D.D.C. 1990)) on the basis of *Brown*. We are not relying on the D.C. Circuit's unpublished opinion that "[w]e find meritless the Secretary's submission that an essential element of the court's reasoning in *Brown* constitutes dictum" (1992 U.S. App. LEXIS 9052). Instead, the compelling point is that the D.C. Circuit could summarily affirm only because the holding of *Brown* satisfied the plaintiff's "*heavy burden* of establishing that the merits of his case are *so clear* that expedited action is justified." *Taxpayers Watchdog v. Stanley*, 819 F.2d 294, 297 (1987) (D.C. Circuit's accepted statement of summary affirmance standard) (emphasis added).

The D.C. District Court has held that the Back Pay Act authorizes interest awards under the anti-discrimination statutes in

six different cases (decided by five different judges)[2] and has never agreed with the contrary analysis applied by the Eighth Circuit. In *Gubisch v. Brady*, the government actually *conceded* that interest was available under *Brown* but argued that *Brown* was "erroneous" and should be "diregard[ed] or overturn[ed]." No. 88-2031 (JHG), 1992 U.S. Dist. LEXIS 4814, at *3 n.1 (D.D.C. Apr. 15, 1992). After the district court awarded the plaintiff interest, the agency filed a notice of appeal but subsequently *withdrew the appeal* in light of the D.C. Circuit's summary affirmance in *Lee*. Order Granting Appellant's Mo. To Dismiss Appeal, No. 92-5231 (CADC July 2, 1992). In *Lander v. Lujan*, in which the government had argued that this holding of *Brown* was "dictum" (1991 U.S. Dist. LEXIS 18921, at *8 (D.D.C. Dec. 23, 1991)), the government did not even bother to appeal the district court's decision rejecting that argument and awarding interest.[3]

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[2] *Gubisch v. Brady*, No. 88-2031 (JHG), 1992 U.S. Dist. LEXIS 4814 (D.D.C. Apr. 15, 1992); *Lander v. Lujan*, No. 85-3833 (JGP), 1991 U.S. Dist. LEXIS 18921 (D.D.C. Dec. 23, 1991); *Lee v. Baker*, 741 F. Supp. 990 (D.D.C. 1990); *Trout v. Garrett*, 56 Empl. Prac. Dec. (CCH) ¶ 40,753 (D.D.C. 1990), *subsequent opinion*, 780 F. Supp. 1396 (D.D.C. 1991); *Mitchell v. Secretary of Commerce*, 715 F. Supp. 409 (D.D.C. 1989); *Brown v. Marsh*, 713 F. Supp. 20 (D.D.C. 1989).

[3] Nor has there been any intervening change in the law. A *parenthetical* in *Department of Army v. FLRA* (56 F.3d 273, 278 (CADC 1995)) cites a single clause in a single sentence in the background discussion of sovereign immunity in *United States v. Nordic Village* (503 U.S. 30, 34 (1992)) for the proposition that "sue-and-be-sued clauses" are "a specific exception to the general rule that a waiver of sovereign immunity must be construed in favor of the sovereign." *Nordic Village* simply reiterated settled law on this point. But even more important, this Petition has nothing to do to with sue-and-be-sued clauses. *Brown* cites *Loeffler v. Frank* (486 U.S. 549 (1988)) not for any proposition involving sue-and-be-sued clauses, but instead for the proposition that a separate statute can waive the government's sovereign immunity from interest. 918 F.2d at 216. Respondent does not even dispute this interpretation of *Loeffler*: "To be sure, *Loeffler* establishes that, under certain circumstances, a waiver of sovereign immunity contained in a separate statute can enlarge the scope of relief available against a federal agency under Title VII." BIO 16 n.8. Moreover, the government's appeals to the D.C. Circuit in *Lee* (which it lost) and *Gubisch* (which it abandoned) both came *after* this Court decided *Nordic Village*, and neither the D.C. Circuit nor the *three* other circuits that have addressed this question subsequent to *Nordic Village* – the Fourth Circuit in *Edwards*, the Tenth Circuit in *Wolff*, and the Eighth Circuit in this case – have found this purported development in the law even worth mentioning. To the extent that Respondent suggests that the

3. Respondent's basis for disclaiming a conflict with the Tenth and Fourth Circuits' decisions in *Edwards* and *Wolff* – that those decisions adopted the D.C. Circuit's reasoning and conclusion in *Brown* "[w]ithout independent analysis" (BIO 19) – is meritless. *Edwards* and *Wolff* squarely "agree[d] and also adopt[ed] *Brown*'s interpretation of the Back Pay Act." *Edwards*, 40 F.3d at 1154 (quoting *Brown*, 918 F.2d at 218); *Wolff*, 57 F.3d at 410-11 ("[T]he Back Pay Act unquestionably contains an express waiver of the federal government's interest immunity." (citing *Brown* and *Edwards* with approval)); *see also Ward v. Brown*, 22 F.3d 516, 520 (CA2 1994) (citing *Brown* with approval for the proposition that "Back Pay Act waives sovereign immunity against prejudgment interest on Title VII back pay awards"). In those courts, "prejudgment interest is available if a case falls within the coverage of the Back Pay Act" (*Edwards*, 40 F.3d at 1154), and no subsequent opinion from either circuit has ever suggested any disagreement with that conclusion.

THE AVAILABILITY OF INTEREST UNDER THE BACK PAY ACT HAS SUBSTANTIAL CONTINUING SIGNIFICANCE

1. Respondent in passing makes the prudential argument that this Court should not expend its limited resources in resolving the question presented because it lacks continuing significance. But Respondent's premise – that this case will not determine the availability of interest for later plaintiffs – is incorrect, and Respondent acknowledges as much. As framed by both Petitioner and Respondent, the question presented involves the proper construction of the Back Pay Act. Pet. i (whether "the Back Pay Act waives the federal government's sovereign immunity"). Bio i (whether "the Back Pay Act waives the sovereign immunity of the United States"). The Eighth Circuit and Respondent simply read the Back Pay Act differently than the D.C., Fourth, and Tenth Circuits. *E.g.*, Pet. App. 55a-56a

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enactment of the CRA was itself a relevant change in the law, all of these appellate decisions post-date that "development" as well.

(Congress "limited Section 5596(b)(2)(A) interest awards to amounts payable under 'paragraph (1)(A)(i)'"); BIO 9 (parsing terms of § 5596(b)(2)(A)). The Back Pay Act, which is unaffected by Congress' adoption of the CRA, applies in particular to age discrimination cases. *E.g.*, *Edwards v. Lujan*, 40 F.3d 1152 (CA10 1994), *cert. denied*, 516 U.S. 963 (1995); *Roepsch v. Bentsen*, 846 F. Supp. 1363 (E.D. Wis. 1994). The availability of pre-judgment interest, which is a fundamental issue of fair employment practice (*see, e.g., Library of Congress v. Shaw* and *Loeffler v. Frank*), therefore now hangs in the balance not only for many Title VII and Rehabilitation Act plaintiffs, but also for the more than 7000 individuals who file claims against the government each year under the ADEA. *See* Pet. 22.

2. There is no basis for Respondent's assertion that this Court should instead "grant review in an ADEA case to resolve that question." BIO 21. This case governs the availability of interest on ADEA back pay awards directly, not by extension or analogy, and the Court grants certiorari precisely because individual cases have wider application than their specific facts. *E.g.*, Pet. 19 n.9 (government successfully sought certiorari in *Library of Congress v. Shaw* based on a "conflict in principle" between the D.C. Circuit's decision under Title VII and decisions of two other circuits under an *entirely different*, but similarly worded, statute). Respondent expressly acknowledges that "interest is not available on awards under the ADEA for the *same reasons* that it was unavailable under Title VII and the Rehabilitation Act before the [CRA]" (BIO 21 (emphasis added)), *i.e.*, because resolution of the interest issue turns on an interpretation of the Back Pay Act, not any other statute. Respondent also makes precisely our point by noting that the CRA "specifically provides for interest in Title VII and Rehabilitation Act cases but does not provide for interest in cases brought under the ADEA" (BIO 21): ADEA plaintiffs can receive interest only under the Back Pay Act, which gives this case substantial continuing significance.

Our view that this case determines the availability of interest in ADEA cases is not hypothetical or academic. Respondent does

not dispute that the federal courts, the EEOC (in both its statements and its formal regulations), the Department of Justice, and the Comptroller General *all* have determined the availability of interest by resort to the terms of the Back Pay Act, and therefore have applied the exact same analysis in determining the availability of interest in ADEA cases as in Title VII and Rehabilitation Act cases.[4] *See generally* Pet. 22-23 (collecting authorities). In *Edwards* (40 F.2d 1152) and *Roepsch* (846 F. Supp. 1363), for example, the plaintiffs brought claims under *both* Title VII and the ADEA, which the courts appropriately treated identically. Other cases under the ADEA uniformly follow the same approach. *E.g.*, *Rollins v. Bennett*, No. C88-388C, 1988 U.S. Dist. LEXIS 16032 (W.D. Wash. Sept. 15, 1988); *In re Dawes*, 69 Comp. Gen. 469 (1990).

3. Finally, Petitioner reiterates that the question presented also has substantial continuing significance for Title VII and Rehabilitation Act plaintiffs. Respondent does not dispute that a large number of cases alleging pre-CRA conduct are still pending in the federal courts as a result of two special circumstances: (i) the CRA does not apply retroactively (*Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)); and (ii) claims based on pre-amendment conduct frequently were not filed in court until late 1994 and early 1995 because of delays inherent in the administrative scheme (Pet. 21 & n.10). Interest is most critical, of course, in these long-pending cases, and more than 10,000 such claims against the federal government were initiated in 1991 alone.

THE EIGHTH CIRCUIT'S INTERPRETATION OF THE BACK PAY ACT IS ERRONEOUS

1. On the merits, Respondent first argues that the Back Pay Act "authorizes interest only on back pay awards made

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[4] There is no support for Respondent's statement that the EEOC "no longer espouses that view" (BIO 13 n.7). The text accompanying the Federal Register entry cited by Respondent (57 Fed. Reg. 12,641-42 (1992)) is sharply critical of the policy imposed on the EEOC by the Department of Justice. *See generally* Pet. 13-17.

under the Back Pay Act itself: 'An amount payable *under paragraph (1)(A)(i) of this subsection* shall be payable with interest." BIO 9 (emphasis in BIO). Respondent's contention turns on the meaning of "payable" in the phrase "an amount payable under paragraph (1)(A)(i)." Most courts and the EEOC have read "payable" to mean "capable of being paid," and therefore have concluded that interest is available for any back pay award that satisfies the conditions of paragraph (1)(A)(i). *E.g.*, *Brown*, 918 F.2d at 216 (if the plaintiff's claim satisfies the terms of paragraph (1)(A)(i), "sovereign immunity . . . would not appear to block the assessment of prejudgment interest on their back pay awards"). The Eighth Circuit and Respondent, by contrast, read payable to mean an amount actually *paid* under paragraph (1)(A)(i). *See supra*. At the certiorari stage, however, the important point is that the split in the circuits over the meaning of "payable" will be resolved by reference to the text and history of the Back Pay Act itself and that, as a result, this case governs claims under the ADEA just as it does claims under Title VII and the Rehabilitation Act.

Moreover, Respondent is wrong on the merits. The Back Pay Act's history demonstrates that its interest provision applies to all back pay awards that satisfy the conditions of "paragraph (1)(A)(i)," not just those amounts actually *paid* "under paragraph (1)(A)(i)." Congress added the interest provision – with its reference to amounts "payable under paragraph (1)(A)(i)" – in 1987. Pub. L. No. 100-202, sec. 101(m), 101 Stat. 1329 (1987). Prior to that time, substantial regulations interpreting paragraph (1)(A)(i) already existed. Those regulations authorized the EEOC to award back pay pursuant to paragraph (1)(A)(i) on ADEA, Title VII, and Rehabilitation Act claims (all of which the EEOC administers) by providing both that the EEOC was an "appropriate authority" under the Back Pay Act and that the Back Pay Act was triggered by a "discrimination complaint." 46 Fed. Reg. 58,275 (1981), *codified in relevant part at* 5 C.F.R. §§ 550.803(d), 550.804(b). When Congress amended the Back Pay Act in 1987 to authorize interest on "amount[s] payable under paragraph (A)(1)(i)," it is presumed to have intended that the

amendment conform to this long-standing administrative interpretation that "an amount payable under paragraph (1)(A)(i)" included an award of back pay under the ADEA, Title VII, or the Rehabilitation Act. *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920).

2. Respondent's second argument on the merits is that the Back Pay Act's interest provision is inapplicable where "Congress created a self-contained statutory scheme for claims of discrimination.' BIO 11 (citing *Brown v. GSA*, 425 U.S. 820 (1976); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979)). We addressed this contention (which was not adopted by the Eighth Circuit) in the Petition (Pet. 12-13) and explained that because the Back Pay Act is triggered only *after* a plaintiff establishes liability under the anti-discrimination statutes, it does not permit a plaintiff to circumvent the administrative exhaustion requirements that motivated this Court's holdings in *Brown v. GSA* and *Novotny*. Moreover, as with its first argument on the merits, Respondent's reliance on *Brown v. GSA* and *Novotny* applies fully to age discrimination claims. According to the Office of Legal Counsel's Memorandum: '[T]he *same analysis* that shows that the Back Pay Act may not be used in a Title VII case also teaches that the ADEA serves as the exclusive means by which a federal employee may obtain relief for a violation of the rights created by that statute." OLC Memorandum at 10 (emphasis added). In particular:

> Congress patterned section 15 of the ADEA after section 717 of Title VII, so both sections should be construed consistently. Relying on *Brown* [*v. GSA*], and analogizing the ADEA to Title VII, federal courts have unanimously concluded that Congress intended the ADEA to provide the exclusive remedy for claims of age discrimination in federal employment. Moreover, by analogy to *Novotny*, courts have concluded that general remedial statutes, such as section 1983 and section 1985(3), are unavailable to supplement the ADEA.

OLC Memorandum at 10-11 (collecting cases) (citations omitted). In the time since OLC issued its Memorandum, the federal courts

uniformly have continued to apply *Brown v. GSA* and *Novotny* exactly to the ADEA just as they do to Title VII. *LaFleur v. Texas Dep't of Health*, 126 F.3d 758 (CA5 1997); *Chennareddy v. Bowsher*, 935 F.2d 315 (CADC 1991); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (CA4 1989). *See generally* Pet. 22-23.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT'S DECISION VACATING PETITIONER'S TAX ENHANCEMENT

Respondent does not dispute that if the Court grants certiorari on Question One presented by the Petition (the interest issue) it should also grant certiorari on Question Two (the tax enhancement issue). The Eighth Circuit's analysis of the two questions is directly bound up together. Pet. App. 57a (because tax enhancements are "analogous to the prejudgment interest remedy," "we treat the tax enhancement remedy like the prejudgment interest remedy and hold that Congress must expressly and unequivocally waive sovereign immunity before a party can recover a tax enhancement award from the federal government"); BIO 17 (arguing that tax enhancement is barred by sovereign immunity as analogous to interest).[5] In addition, Respondent does not deny the exceptional importance of this question, given that the Eighth Circuit's decision deprives federal employees of a wide array of relief previously available under Title VII and the Rehabilitation Act. Pet. 27 (treatise collecting

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[5] Even on Respondent's view of this case, Petitioner would be entitled to a tax enhancement as of the effective date of the Civil Rights Act of 1991. Respondent contends that any waiver of the federal government's sovereign immunity from monetary awards in particular must be express. BIO 16. Section 102 of the CRA, however, expressly authorizes the award of monetary damages on Rehabilitation Act claims. 42 U.S.C. § 1981a(a)(2). *Contra* Gov't C.A. Br. at 30 (arguing that tax enhancement is not available under § 102). "Section 102 significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to backpay under prior law [by authorizing a] plaintiff who wins a backpay award [to] also seek compensatory damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994).

twelve different forms of relief not expressly listed in the statute but nonetheless awarded to "make the plaintiff whole").[6]

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[6] Certiorari also is warranted because the ruling below conflicts with the holdings of several other circuits that the Equal Employment Opportunity Act of 1972 ("EEOA") – which applied Title VII to the federal sector – waives the federal government's sovereign immunity from relief under Title VII and grants federal employees the same rights and remedies as are available in private-sector cases. These circuits recognize that "[b]y adopting the EEOA, Congress intended to minimize differences between private and public employees, *especially judicial barriers of sovereign immunity*." *Greenlaw v. Garrett*, 59 F.3d 994, 999 (CA9 1994) (emphasis added). "Congressional intent determines whether sovereign immunity will apply in suits against the federal government, and as we have emphasized, Congress *clearly intended* that federal employees receive the same rights to sue under Title VII as private sector workers." *Johnson v. Burnley*, 887 F.2d 471, 478 (CA4 1989) (emphasis added). "Indeed, the whole purpose of the 1972 Amendments was to give public employees the same protections against discrimination as those enjoyed by employees in the private sector." *United States v. City of Chicago*, 573 F.2d 416, 423 (CA7 1978)